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SUPREME COURT OF THE UNITED STATES.

No. 62.

DUNCAN McARTHUR'S HEIRS, COMPL'TS,

vs.

WALTER DUN'S HEIRS.

ON A CERTIFICATE OF DIVISION FOR THE CIRCUIT COURT UNITED STATES FOR OHIO.

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S. D. Langtree, Print.

At a circuit Court of the United States of America, within and for the Seventh Circuit and District of Ohio, begun and held at the court house in the city of Columbus, on the third Monday in the month of December, being the 21st day of the same month of December, in the year of our Lord one thousand eight hundred and forty, and of the American Independence the sixty-fifth.

Present, the Honorable John McLean, Judge of said Circuit, the Honorable Humphry H. Leavitt, Judge of said District.

Among other proceedings had, were the following, to wit:

ALLEN MCARTHUR and others, heirs, &c. of Duncan McArthur, deceased, *Complts.*
vs.
The heirs of WALTER DUN, deceased, *Respt.*
} In Chancery.

In this case, the bill and demurrer being filed as follows, to wit:

Bill.

To the Honorable the Judges of the Circuit Court of the United States for the District of Ohio.

Duncan McArthur, a citizen of and resident in the State of Ohio, represents to your honors that on or about the 20th day of July, A. D. 1834, one Walter Dun, then in full life, and a citizen of and resident in the State of Kentucky, filed his original bill in this court, against your orator, setting forth that on the 10th day of December, A. D. 1824, one James Galloway, Jr., made or caused to be made on the books of the late Col. Richard C. Anderson, the surveyor of the Virginia army lands, the following entry: "No. 12545, James Galloway, Jr., ass'ee., entered 200 acres of land on part of a military warrant, No. 6648, on the waters of Deer creek, beginning at the easterly corner of Joseph Swearinger's survey, No. 4200, thence N. 48, E. 160 poles, to the southerly corner of Huff & Taylor's survey, No. 3726, thence with their line N. 42, W., and from the beginning, with the line of Swearinger's said survey, N. 42, W., so far that a line N. 48 E., will include the quantity;" and on the 15th day of December, 1824, caused a survey to be made on said entry and in strict conformity thereto; and on the 4th day of April, 1825, obtained from the President of the United States a patent for said tract of two hundred acres of land, which is situated in the County of Madison, in the State of Ohio; and the said Dun further alleged, that his entry was special

and in all things in conformity with the law; and that the said survey was made and executed in strict conformity with said entry, and that the said entry, survey and patent was an appropriation of the said tract of land, and referred in his said bill to an attested copy of said entry, survey and patent, and prayed that the same might be taken and considered as parts of said bill; that on the 28 of July, 1832, he received from James Galloway, Jr., the patentee, a deed of conveyance for said tract of land; that at the time of said conveyance, he held in trust for said Galloway, one half of the proceeds of said tract of land; that since that time, he had purchased said Galloway's interest, and was then the bona-fide owner of said tract of land, for a valuable consideration, to which deed or an attested copy thereof he referred, and prayed that the same might be taken as a part of his petition. Said Dun further stated that your petitioner, the said Duncan McArthur, on the 3d of January, 1825, obtained from the President of the United States a patent for the said tract of land, founded on an entry made in the name of one Robert Means, ass'ee, on the 23d of November, A. D. 1822, and a survey made on said entry in the name of said Robert Means, ass'ee, on the 18th day of March, 1823, to a certified copy of which entry and survey the said Dun in his said bill referred, and prayed that the same might be taken as part thereof. The said Dun, in his said bill, further stated and expressly charged, that Robert Means, in whose name the said entry and survey was made, was not living, but had departed this life about the month of March, 1808, and insisted that the entry made in his name after his decease was null and void; and that the patent obtained on said entry and survey was fraudulently procured, and that the land aforesaid was not appropriated thereby. The said Dun further alleged, that he had a complete, equitable title to the said tract of land, and that the elder legal title thus erroneously and fraudulently obtained by the said McArthur, was in him, the said McArthur. The said Walter Dun, in consideration of the premises by him therein stated, prayed that the said Duncan McArthur might be made defendant to said bill of complaint, and that your honors would, by your decree, annul the legal title obtained by said McArthur for said tract of land, or that your honors would order and decree that the said McArthur should convey to him, the said Walter Dun, all the right and title to the said tract of land which he acquired by the patent issued to him; and that your honors would grant such other and further relief as might be consonant to equity and justice, and would meet the case of the said petitioner. And afterwards, viz: on the 13 day of December, A. D. 1834, the said Duncan McArthur, by his solicitor, filed his demurrer to the said bill in chancery, and for cause of demurrer shewed that the said Walter Dun, by his said bill, had not made such a case as entitled him in a court of equity to any relief against him, the said Duncan McArthur. Wherefore, and for other good causes, the said McAr-

thur demurred to the said bill, and prayed the judgment of the court, and to be hence dismissed with his reasonable costs, &c. And afterwards, viz: on the said 15 day of December, 1834, the said Walter Dun, by Creighton & Bond, his solicitors, filed their joinder in said demurrer; and afterwards, at the July term, 1835, the said cause coming on for argument on the said bill and demurrer, and the same being argued by counsel for plaintiff and for defendant, the said court did, on full consideration, overrule and disallow said demurrer to be a good and sufficient defence in law to the said bill of complaint, and leave was thereupon given to the said Duncan to file his answer in 60 days after the rising of the then term of said court. And the said Duncan McArthur, having failed to plead or answer said bill within the time allowed him by said court, afterwards, at the July term, 1836, the said court, on motion of the complainant's counsel, did order. adjudge and decree that the said entry in the name of the said Robert Means, ass'ee, made on the 23d of Nov. 1822, and the survey made thereon in the name of the said Means, ass'ee, on the 18th of March, 1823, and the patent issued to the said McArthur, founded on said entry and survey, are null and void, for the reason that at the time of said entry and survey, the said Robert Means was deceased. And it was further ordered and decreed, that the said McArthur, his heirs and assigns, be perpetually enjoined from setting up the said entry or patent or any record thereof, against the said complainant, his heirs and assigns. It was further ordered and decreed, that the said Duncan McArthur should, within thirty days from the rising of said court at its then present term, release to the said Walter Dun all his interest and title to the 200 acres of land in said bill mentioned, acquired under said entry, survey and patent, to him, the said McArthur; and, in case of his failure to do so, that said decree should operate and enure as and for such release; and the said Duncan McArthur was further ordered and decreed to pay the costs of that suit. And your orator states and shews to your honors, that since the rendition of said decree, some time on or about the 1st day of January, A. D. 1838, the said Walter Dun departed this life, leaving the following children his sole and only heirs at law, to wit: Mary A. Tompkins, John G. Dun, James Dun, all being of lawful age; and the said Mary A. Tompkins being a single woman, and Walter A. Dun and Robert G. Dun, both being infants under the age of twenty-one years, and all of said children being citizens of and residents in the State of Kentucky, and whom your orator prays may be made defendants to this his bill of review, and that the said infant defendants may appear and defend by their guardian ad litem, to be appointed by this honorable court. And your orator avers that he is aggrieved by the said proceedings and decree, and ought not to be bound thereby; and that the said decree is erroneous and ought to be reversed. And your orator, according to the course of this court, for causes of errors, assigns the following, viz:

1st. Your orator says, that the said entry and survey in name of Robert Means, and the patent issued thereon, were good and valid in law, and vested the legal and equitable title to said land in the said Duncan McArthur, and that it was error in said decree to pronounce the same to be null and void.

2d. Your orator further says there was error in said decree in perpetually enjoining the said Duncan McArthur from setting up the said entry or patent against the said Walter Dun, his heirs or assigns.

3d. Your orator further says there was error in said decree in ordering and decreeing that the said McArthur should, within the time therein specified, convey the said land to the said Walter Dun, and, in case of his failure to do so, that the said decree should stand as and for a conveyance thereof.

4th. Your orator further says there was error in decreeing that the said Duncan McArthur should pay the costs of that suit.

For all which errors and imperfections, your orator has brought this his bill of review, and conceives that he should be relieved therein. Your orator therefore prays that a writ of subpœna may be issued against the said Mary A. Tompkins, John G. Dun, James Dun, Walter A. Dun, and Robert G. Dun, that they may be compelled to answer all and singular the premises; that the said proceedings and decree may be reviewed and reversed, and that your orator may be relieved in all and singular the premises, according to equity and good conscience. And as in duty bound, will ever pray, &c.

SAMUEL F. VINTON, and
B. G. LEONARD,
Sol. for Complt.

Demurrer.

"The demurrer of Mary A. Tompkins, John A. Tompkins, John G. Dun, and James Dun, to the bill of review exhibited against them and others, in the Circuit Court of the United States for the Seventh Circuit and District of Ohio, by one Duncan McArthur, and since revived in the name of his heirs.

These defendants, by protestation, not confessing all or any of the matters and things in the said complainant's bill contained, to be true in such manner and form as the same are therein and thereby set forth and alleged, do demur in law thereto, and for cause of demurrer, show, that there are no errors in the record and premises, and in the decree made therein at the said July term, A. D. 1836, of said Circuit Court, in said bill of review mentioned; nor is there any sufficient matter alleged in said bill of review, to entitle the said complainants to reverse the said decree; and for divers other errors and defects appearing in the said bill of review,

these defendants do demur in law thereto, and humbly pray the judgment of the court, whether they ought to be compelled to put in any further or other answer to the same, and pray to be hence dismissed with their reasonable costs in this behalf sustained.

W. CREIGHTON, Jr.,
Sol. for defts.

The cause was argued by counsel, and on the point, whether there was error in the decree sought to be opened up and set aside, on the ground that the original entry of Robert Means was made after his decree, on which the survey was made, and the patent issued, the Judges were opposed in opinion, and, on motion of the complainant, the point is certified under the act of Congress.

THE UNITED STATES OF AMERICA,
District of Ohio, ss.

I, William Miner, Clerk of the Circuit Court of the United States for the District of Ohio, aforesaid, certify the foregoing to be a true, examined copy, taken and copied from the files and records of said court.

In testimony whereof, I have hereunto set my hand, and affixed the seal of said Court, at the city of Columbus, [L. S.] this 9th day of February, Anno Domini 1841, and in the 65th year of the Independence of the United States of America.

Attest: WM. MINER, *Clerk.*

Filed 6th March, 1841.